No. 12157

United States
Court of Appeals
for the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HONE & LOBREE,
79 Post Street,
San Francisco, California.

Attorneys for Defendant and Appellant.

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the Northern District of California, Southern Division

No. 31834-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALEXANDER LAWRENCE ALPERS,

Defendant.

INFORMATION

(Title 18 USCA Section 396)

First Count:

The United States Attorney charges: That Alexander Lawrence Alpers, (hereinafter referred to as "said defendant"), did, on or about the 28th day of July, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Olympia, State of Washington, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Music Bar, 403 South Washington, Olympia, Washington.

Second Count:

The United States Attorney further charges: That the said defendant did, on or about the 18th day of August, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Dallas, State of Texas, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Blue Bonnet Music Company, 3235 Ross Avenue, Dallas, Texas.

Third Count:

The United States Attorney further charges: That the said defendant did, on or about the 13th day of August, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Olympia, State of Washington, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Music Bar, 403 South Washington, Olympia, Washington.

/s/ FRANK J. HENNESSY,
United States Attorney.
By /s/ DANIEL C. DEASY,
Assistant United States Attorney.

United States of America,
State and Northern District of California,
Southern Division—ss.

Thomas P. Dowd, Jr., being first duly sworn, says that he is a Special Agent of the Federal Bureau of Investigation of the United States Department of Justice, and as such is familiar with the facts alleged in the foregoing Information, which facts are true of his own knowledge.

/s/ THOMAS P. DOWD, JR.

Subscribed and sworn to before me this 22 day of December, 1948.

(Seal) /s/ C. A. TROLLIST,
Depnty Clerk, U. S. District Court, Northern District of California.

WAIVER OF INDICTMENT

I, the undersigned, Alexander Lawrence Alpers, named in the foregoing Information, being present with my counsel in the United States District Court for the Northern District of California, Southern Division, at San Francisco, California, and having been advised of the nature of the charge made against me in the foregoing Information, and of my rights, and understanding that the offenses charged

in said Information are felonies, do hereby, in open court, waive prosecution by indictment, and consent to be prosecuted by the foregoing Information instead of by indictment.

Dated: December 22, 1948.

/s/ ALEXANDER LAWRENCE ALPERS,
Defendant.
/s/ DANIEL C. DEASY,
Witness.
/s/ HASKELL TITCHELL,
Counsel for Defendant.

[Endorsed]: Presented in Open Court and Ordered filed Dec. 22, 1948.

[Title of District Court and Cause.]

MOTION OF DEFENDANT TO DISMISS INFORMATION

Now comes the defendant and not waiving his right to plead not guilty to the Information heretofore filed herein, moves that the Information be dismissed on the following grounds:

I.

That the Information and each and every part thereof fails to allege facts sufficient to constitute an offense under the laws of the United States.

Wherefore, this defendant prays that his motion be granted and that the Information be dismissed.

HONE & HONE,
By /s/ HASKELL TITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 22, 1948.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, Dec. 22, 1948.

/s/ ALEXANDER LAWRENCE ALPERS,
Defendant.

HONE & HONE,
By /s/ HASKELL TITCHELL,
Attorneys for Defendant.

/s/ DANIEL C. DEASY,
Assistant United States Attorney.

Approved:

/s/ MICHAEL J. ROCHE,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed Dec. 22, 1948.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 22nd day of December, in the

year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ARRAIGNMENT; MOTION TO DISMISS INFORMATION DENIED; PLEA OF NOT GUILTY.

In this case the defendant, Alexander Lawrence Alpers, in open Court, signed a waiver of Indictment. On motion of Daniel C. Deasy, Esq., Assistant United States Attorney, and presenting an Information against Alexander Lawrence Alpers for violation of Title 18 U.S.C.A., Sec. 396, the Court ordered that said Information be filed and made a record of this Court, that bench warrant issue for arrest and appearance of defendant, and that bail for release be fixed in sum of $1000.00.

The defendant Alexander Lawrence Alpers was present in proper person and with his attorney, H. Titchell, Esq. On motion of Mr. Deasy, the defendant was called for arraignment. The defendant was informed as to the filing of the Information by the United States Attorney, and asked if he was the person named therein, and upon his answer that he was and that his true name was as charged, thereupon Mr. Titchell waived the reading of the Information and copy thereof was handed to him. The defendant stated that he understood the charge against him.

Mr. Titchell made a motion to dismiss Information, which motion, after hearing argument of the attorneys, was ordered denied.

The defendant was then called to plead and thereupon said defendant pleaded "Not Guilty" to the Information filed herein against him, which plea was ordered entered.

With the approval of the Court and consent of the Government, defendant waived trial by jury in writing. After hearing counsel herein, it is ordered that this case be continued to December 23, 1948, for trial.

District Court of the United States for the Northern District of California, Southern Division

No. 31834-R

UNITED STATES OF AMERICA,

v.

ALEXANDER LAWRENCE ALPERS.

JUDGMENT AND COMMITMENT

On this 23rd day of December, 1948, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violation of Title 18 USCA., Sec. 396, (Cts. 1 & 2) defendant shipped in interstate commerce, packages containing matter of an indecent character as charged in Cts. 1 & 2 of Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine to the United States of America, in the sum of One Hundred Dollars ($100.00) on Each of Counts One and Two of the Information, making a total fine in the sum of Two Hundred Dollars ($200.00) and in default of the payment of said, that defendant be imprisoned until payment of said fine or until said defendant is otherwise discharged by law.

Count Three Dismissed.

/s/ MICHAEL J. ROCHE,
United States District Judge.

/s/ J. P. WELSH,
Deputy Clerk.

[Endorsed]: Filed and entered this 23rd day of December, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Alexander Lawrence Alpers, 645 Leavenworth Street, San Francisco, California;

Name and Address of Appellant's Attorney: Hone & Lobree, by Haskell Titchell, 79 Post Street, San Francisco 4, California.

Offense: Violation Title 18 USCA 396 by depositing with Railway Express Company for shipment in interstate commerce packages containing obscene, lewd, lascivious and filthy phonograph records. Two counts.

Statement of Judgment: On December 23, 1948, defendant found guilty on two counts of depositing with Railway Express Company for shipment in interstate commerce of package containing obscene, lewd, lascivious and filthy phonograph records. Defendant fined $100.00 upon each count.

The above-named appellant hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: December 30, 1948.

/s/ HONE & LOBREE,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in refusing to dismiss the Information for failure to allege facts sufficient to constitute an offense under the laws of the United States.

2. The court erred in determining that phonograph records were included in and covered by Title 18 USCA 396.

3. That the judgment is void.

Dated: December 30, 1948.

/s/ HONE & LOBREE,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

I.

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Information;
2. Defendant's Motion to Dismiss Information;
3. Minute Order of December 22, 1948, denying defendant's motion to dismiss Information;
4. Plea to Information;
5. Waiver of Trial by Jury;
6. Judgment;
7. Notice of Appeal;
8. Statement of Points on which Appellant intends to rely;
9. This Designation.

Dated: December 30, 1948.

/s/ HONE & LOBREE,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing documents, listed below, are the originals, or true and correct copy of order entered on the minutes of this

Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the Appellant.

Information
Motion of Defendant to Dismiss Information.
Waiver of Jury Trial.
Minute Order of December 22, 1948.
Judgment.
Notice of Appeal.
Statement of Points.
Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of January, A.D. 1949.

(Seal) C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12157. United States Court of Appeals for the Ninth Circuit. Alexander Lawrence Alpers, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court
of Appeals, Ninth Circuit

No. 12,157

ALEXANDER LAWRENCE ALPERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant intends to rely and the portion of the record which is material to the consideration of the appeal are the same as those heretofore designated by appellant at the time of filing his Notice of Appeal in this cause and as are specifically set forth in appellant's "Statement of Points" and "Designation of Record" filed in the United States District Court for the Northern District of California, Southern Division, in proceeding numbered 31834-R in the records and files of said court.

Dated: January 27, 1949.

/s/ HONE AND LOBREE,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed January 27, 1949.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12157

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

Proceedings had in the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, May 16, 1949

Before: DENMAN, Chief Judge, BONE and ORR, Circuit Judges

Order of Submission

Ordered appeal in above cause argued by Mr. Haskell Titchell, counsel for appellant, and by Mr. Daniel C. Deasy, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, May 31, 1949

Before: DENMAN, Chief Judge, BONE and ORR, Circuit Judges

Order Directing Filing of Opinion and Filing and Recording of Judgment

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Court of Appeals for the Ninth Circuit

No. 12,157

May 31, 1949

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, Chief Judge; BONE and ORR, Circuit Judges

ORR Circuit Judge:

Appellant was convicted on two counts of an information charging him with knowingly depositing with the Railway Express Agency, for carriage in interstate commerce, certain obscene phonograph records. This, according to the Government's theory, constitutes a violation of certain of the provisions of 18 U. S. C. A. § 396.

That the phonograph records were deposited for carriage in interstate commerce is admitted; that there was inscribed thereon obscene matter is also admitted.

The question for determination is: Are the provisions of 18 U.S.C.A. § 396 broad enough to include phonograph records? The statute, insofar as it is material here, reads: "Whoever shall * * * deposit with any express company * * * for carriage from one state * * * to any other state * * * any obscene, lewd or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of an indecent character, * * *".

It is appellant's contention that by enumerating particular classes of obscene matter, Congress evinced a clear intention of limiting the application of the statute and of the general words employed therein, relying on the rule that where a statute employs specific words enumerating specific classes, modes or species, the statute should be construed as being limited in operation and not all-inclusive in scope. The Government admits this rule should be applied in construing the statute under consideration but insists that a proper application thereof demonstrates conclusively that it (18 U.S.C.A. § 396) prohibits the shipment in interstate commerce of phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language. In approaching a consideration of the questions involved in this case we should keep in mind

that the rule of strict construction must be applied and that the doctrine of ejusdem generis is particularly applicable to criminal cases. U. S. v. Salem, 235 U. S. 237; First National Bank of Anamoose v. U. S., 206 Fed. 374. Had Congress intended the statute to be all-inclusive it very readily could have eliminated mention of the special classes and employed the general words "any obscene or indecent matter". The title of the Act at the time of enactment is some indication of the true intention of the Congress in enacting § 396. It read: "Importing and transporting obscene books." This is not controlling but does point up the fact that in all probability Congress intended only a prohibition against the transportation of obscene literature.

A rule of value sometimes employed in construing a statute is to construe it with reference to the evil it was designed to suppress, this in the event "the language is ambiguous and equally susceptible of conflicting construction. But * * * this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute is designed to suppress." United States v. Chase, 135 U. S. 255. The use of phonograph records to transmit obscene matter involves the same mischief which the statute is designed to suppress. It is matter of indecent character, but is entirely different from the methods enumerated.

Two prime methods can be employed in communicating obscene matter to the human mind—visual and auditory representations. This may be accomplished by graphic and lingual representations which may be used with or without mechanical assistance. Prior to 1920 the prohibited matter in the statute fell within the broad classification of visual representation. However, as scientific discoveries progressed it became evident that all visual representations were not ejusdem generis with the species mentioned in § 396 because the enumeration there made required no mechanical contrivance to render them susceptible of being read or observed. Congress, in 1920, added the words "motion-picture film" and in doing so very properly considered that motion-picture film was not within the classification theretofore mentioned in the statute. The motion-picture film is a succession of photographs on a film. The word "photograph" is a combination of the Greek words photos, meaning light, and graphos, meaning writing, and a photograph is a light writing. By the amendment of 1920 the photographic motion picture film was added to a statute theretofore containing the word *writing*. By the amendment Congress demonstrated that the word *writing*, as used in the statute before 1920 was not so used in its broadest sense. Such being the case the question is immediately posed: Why the omission, at the time of the amend-

ment, to mention obscene phonograph records if they be not within the statutory prohibition?

The word "phonograph" is a combination of the Greek words "phone", meaning sound, and graphos, meaning a writing; hence, a phonographic disc is a sound writing. The word *writing*, as used in the statute before 1920, not being sufficiently broad to include *light* writing it certainly did not include *sound* writing. It seems to us the reason Congress did not include *sound* writing in the 1920 amendment was because it was thinking solely in terms of visual representation. Motion picture film at that time had no sound track attachment and was visual representation.

Appellee ingeniously argues that visual representations could not have been the only methods which Congress had in mind when enacting the statute because by use of the Braille system, books are written for use of the blind and certainly the statute contains the word book. We are not impressed with the argument because the probability of finding the evil designed to be suppressed in the Braille system of communication is so extremely remote that it cannot be said to weigh against our conclusion that Congress was thinking only in terms of visual representation. Whether or not a book of that character conveying obscene matter would be a violation of the statute we do not decide.

The Government, in its analysis of § 396, and as a justification of its position that obscene phonograph records are within the prohibition of the statute, points to the word *print* used therein. The Government argues that a phonograph record is a print within the broad meaning of the term. It cites dictionary definitions in support of such an argument.

In the case of United States v. Harman, 38 Fed. 827, the court, in discussing the meaning of the word print used in the statute banning obscene matter from the mails (18 U.S.C.A. § 334), asks the question: "What is meant by print?" and answers by stating that "undoubtedly in its broadest sense it may be an impression of either figures, characters or letters. In its more common sense it is used as applicable to letters."

"It is not necessary, however, that the characters produced should be letters or numerals, or the result of types or stereotypes, or be reading matter, but the term print or printing includes the most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface." Arthur v. Moller, 97 U. S. 365, 367.

"Printing means the impress of letters or characters upon paper or upon other substance * * * and implies a mechanical art." Daly v. Beery, 178 N.W. 104, 106.

"The word print has a wide range of signification; but its ordinary meaning is to impress letters, figures and characters, by

types and ink of various forms and colors, upon paper of various kinds, on some such yielding surface." Forbes Lithograph Co. v. Worthington, 25 F. 899, 900.

The method of producing a phonograph record, as we understand it, is accomplished by a needle cutting the non-resistant surface of a wax disc.[1] After this operation is completed that which is recorded is not understandable until produced as sound through a mechanical device and thus conveyed to the senses in a manner so radically different from that of imparting to the senses the meaning and contents of prints ordinarily associated with the printing art that one cannot say there is not a reasonable doubt that Congress intended to include them. The rule of strict construction requires a holding that phonograph records are not included in the word print.

What we have said disposes of the contention that phonograph records come within the meaning of the term "or other matter of indecent character." To do so would require a holding that the word "matter" relates to a class or species enumerated in the statute. The only class or species to which it would belong, according to the government's contention, would be those covered by the word "print". We have held that the word "print" does not include phonograph records. The general term "or other matter of an indecent character" is not all-inclusive.

Judgment reversed.

(Endorsed:) Opinion. Filed May 31, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

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[1] Copies are produced from a mold made from the original recording but the requirement of mechanical assistance in order that the recorded matter may be imparted to the senses remains.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed.

(Endorsed:) Judgment. Filed and entered May 31, 1949, Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 12157.

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record, Certified Under Rule 38 of the Revised Rules of The Supreme Court of the United States

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-one (21) pages, numbered from and including 1 to and including 21, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of the Honorable Philip B. Perlman, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of June, 1949.

[SEAL.] (s.) PAUL P. O'BRIEN,
Clerk.

Supreme Court of the United States

No. —, October Term, 1949

UNITED STATES OF AMERICA, PETITIONER,

vs.

ALEXANDER LAWRENCE ALPERS

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 30th, 1949.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of June, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 844538 14

Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 217

UNITED STATES OF AMERICA, PETITIONER

v.

ALEXANDER LAWRENCE ALPERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing respondent's conviction, in the United States District Court for the Northern District of California, Southern Division, for knowingly depositing obscene phonograph records with an express company for carriage in interstate commerce, in violation of the provisions of Section 396 of Title 18, U.S.C. (1946 ed.), Criminal Code, Section 245, now Section 1462 of Title 18, U.S.C.[1]

---

[1] Except for minor changes in phraseology and style, the relevant provisions of Section 1462 of the new Title 18, U.S.C. are identical with those of Section 396 of Title 18, U.S.C. (1946 ed.). See Appendix, *infra*, for the two statutes.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 14-18) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1949 (R. 19). On June 30, 1949, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to July 30, 1949 (R. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See, also, Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether section 396 of Title 18, U.S.C. (1946 ed.)—penalizing the interstate shipment of "any obscene . . . book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character"—prohibits the shipment of obscene phonograph records.

STATUTE INVOLVED

The pertinent statute (Criminal Code, sec. 245, 18 U.S.C. 396 (1946 ed.)) is set forth in the Appendix, *infra*.

STATEMENT

Respondent was duly charged by information, in three counts, with knowingly depositing with the Railway Express Agency for carriage in interstate commerce certain obscene phonograph records, in violation of the provisions of Section 396 of Title 18, U.S.C. (1946 ed.) (R. 2-5).

Jury trial was waived (R. 6, 8), and respondent pleaded not guilty (R. 8). On December 23, 1948, he was tried and found guilty by the District Court on two counts of the information, and the third count was dismissed (R. 8-9). The court imposed a sentence of a fine of $100 on each of the two counts (R. 9). Respondent appealed solely on the ground that the statute did not cover phonograph records (R. 10, 13). He did not challenge the fact of interstate shipment nor that the records contained obscene matter (R. 15). The conviction was reversed by the Court of Appeals for the Ninth Circuit on respondent's ground that obscene phonograph records are not within the prohibition of Section 396 of Title 18, U.S.C. (1946 ed.), now 18 U.S.C. 1462 (R. 15-18).

REASONS FOR GRANTING THE WRIT

Although it concedes that the transportation of obscene phonograph records involves precisely the mischief which Section 396 was designed to suppress (R. 16), and also that such records may normally be described as "matter of indecent character", the general term used in the statute (R. 16), the Court of Appeals nevertheless holds that records are not within the legislative prohibition because the method of communication to the human mind is entirely different from the methods specifically enumerated by Congress in the section (R. 18). This restrictive interpretation wholly nullifies the statutory phrase "other matter of

indecent character", opens interstate commerce to much obscene material, defeats the obvious purpose of the legislation, and is an erroneous application of the rules as to *ejusdem generis* and the strict construction of penal acts.

1. Construing the objects expressly mentioned in the statute ("book, pamphlet, picture, motion-picture film, paper, letter, writing, print") as all involving visual methods of communication, the court below concludes that the statute distinguishes between visual and auditory means of conveying obscenity, and prohibits only the former. It finds almost its sole support for this theory in the 1920 amendment (Act of June 5, 1920, 41 Stat. 1060), adding motion picture films to the enumerated specific items despite the fact that the words "or other matter of indecent character" were already contained in the statute. This change, the lower court reasons, proves that prior to 1920 only visual representations were barred, and only those, in addition, which did not require the use of mechanical methods for their presentation. By the 1920 amendment, the statute was extended to include classes of items of visual representation which require the aid of a mechanical device, but the act was still limited to visual means of communication (R. 16-17).

Even as formulated, this strained interpretation encounters very heavy weather when it approaches the area of obscene braille books, sound-

tracks on motion picture films, or the new ribbon-type recording prints. But its basic fallacy lies in the gratuitous assumption that Congress definitively intended Section 396 to cover only "visual representations", although auditory and other means of communication are readily capable of conveying the very evil which Congress has long been solicitous to eradicate in its sphere of control. There is no hint anywhere in the legislative history of the narrow and deliberately ineffective purpose assumed by the Court of Appeals. The 1920 addition of "motion-picture film" indicates, we believe, that Congress was anxious to make doubly sure that this new method of universal popular entertainment, which at that time was being widely condemned for immorality, be kept free from salaciousness.[2] To us, the amendment, far from being proof of a restrictive purpose, is a confirmation by Congress of its firm desire to ensure that all means and methods of

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[2] The amendment's formal legislative history shows no more than that it sought to amend the statute by "adding the words 'motion picture films' to the list" of prohibited articles. H. Rept. No. 580, 66th Cong., 2d Sess.; S. Rept. No. 528, 66th Cong., 2d Sess.; 59 Cong. Rec. 2178-9, 7162, 7297, 8280, 8334. There was no intimation that this "addition" was compelled by the belief that the statute did not then cover this item, rather than by a desire to leave no possible loop-hole.

During and immediately after World War I, the American motion picture industry grew enormously, and there was widespread and increasing condemnation of "sensationalism" and of the immoral character of many films. See *The Motion Picture Industry* (Nov. 1947), 254 Annals of the Amer. Acad. of Pol. and Soc. Sci., at pp. 7-9, 140, 155, 157. It is reasonable to assume that the Act of June 5, 1920 was a Congressional response to this public reaction.

communicating obscenity be barred from interstate commerce. And the very comprehensiveness of the listing of specific items, taken together with the inclusion of a general concluding phrase ("or other matter of indecent character"), strongly suggests the all-embracing character of the prohibition.[3]

2. If the general words of the section are to be limited to objects employing visual means of representation, as the Court of Appeals has held, then they are effectively excised from the act, for it is quite clear that the specific items are sufficiently comprehensive to exhaust that genus and leave nothing essentially similar upon which the general terms may operate. But this Court has long since held that the rule of *ejusdem generis* may not be invoked to render the general words of a statute superfluous, since such an application would disregard the primary principles that effect should be given to every part of a statute if legally possible, and that the words of a statute are to be taken according to their natural meaning. *Mason* v. *United States*, 260 U.S. 545, 554. Legislatures normally adopt alternative or additional provisions for the purpose of affording *added* safe-

[3] It is clear that Congress has not limited its general policy of prohibiting the communication of obscene material to visual means of communication. The uttering of "obscene, indecent, or profane language" over the radio has long been forbidden. Radio Act of 1927, Sec. 29, 44 Stat. 1162, 1173; Communications Act of 1934, 48 Stat. 1064, Sec. 326, 47 U. S. C. (1946 ed.) 326; 18 U. S. C. 1464.

guards, and the rule of statutory construction gives no warrant for reading them as if they were merely repetitious. Cf. *United States* v. *Gilliland*, 312 U.S. 86, 93. Moreover, in criminal statutes as well as in others, there is no justification for mechanically applying *ejusdem generis* to subvert a plain legislative intention. As this Court said in *Gooch* v. *United States*, 297 U.S. 124, at 128:

> The rule of *ejusdem generis* while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view.

No rule of statutory construction requires an interpretation of Section 396 which would distort or nullify the obvious meaning and purpose of this legislation. It is sufficient if the words are given their fair meaning in accord with the intent of Congress. As the Court of Appeals admits (R. 16), the shipment of obscene phonograph records in interstate commerce is clearly within the mischief which the statute is designed to suppress, and likewise comes within the normal meaning of the statutory phrase "other matter of indecent character". It is natural to couple obscene records with

books and the other articles specifically mentioned; they are ordinarily considered as in the same general class.[4] It follows that obscene records are "fairly within [the] letter and spirit" of the statute (cf. *Swearingen* v. *United States*, 161 U. S. 446, 451), and to refuse to include them strains, distorts, and limits the act's effectiveness, contrary to the purpose and words of Congress. Cf. *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *United States* v. *Gaskin*, 320 U. S. 527, 529.

3. The question presented is one of importance in the administration of the law prohibiting the means of interstate commerce to be used in transporting obscene matter. The decision below, if permitted to stand, will enable purveyors of obscene matter to introduce their wares into interstate commerce by resorting to phonograph records and other devices for auditory communication. A substantial gap will thus be broken in the dike Congress has erected against the flow of obscene, lascivious, lewd, or filthy material.[5]

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[4] Like books and other printed material, records convey obscenity by use of language; they are also capable of repeated use in the dissemination of obscenity, are readily portable, and may easily be concealed. Exactly the same types of obscenity may be conveyed by records as by books, the only difference being in the sense which receives the communication.

[5] The Court of Appeals' decision may also have an effect on the interpretation of 18 U.S.C. 1461, dealing with the *mailing* of obscene matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1949

APPENDIX

1. Section 396 of Title 18, U. S. C. (1946 ed.), Criminal Code, Sec. 245, provides:

Importing and transporting obscene books.

Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned ar-

ticles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. Section 1462 of Title 18, U. S. C. (effective September 1, 1948) provides:

§ 1462. Importation or transportation of obscene literature.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly deposits with any express company or other common carrier, for carriage in interstate or foreign commerce any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter

r thing the depositing of which for carriage
s herein made unlawful—

Shall be fined not more than $5,000 or im-
risoned not more than five years, or both.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 217

UNITED STATES OF AMERICA, PETITIONER

v.

ALEXANDER LAWRENCE ALPERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 14-18) is reported at 175 F. 2d 137.

JURISDICTION

The judgment of the Court of Appeals was entered May 31, 1949 (R. 18-19). On June 30, 1949, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to July 30, 1949 (R. 20). The petition

was filed July 29, 1949, and was granted October 10, 1949. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether Section 245 of the Criminal Code, which prohibits the interstate shipment of "any obscene * * * book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character," prohibits the shipment of obscene phonograph records.

STATUTE INVOLVED

Section 245 of the Criminal Code, 18 U.S.C. (1946 ed). 396, now 18 U.S.C. (1948 rev.) 1462, provided as of the dates involved in this case:

> Importing and transporting obscene books.
>
> Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or

from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy *book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character,*[1] or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made, or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On December 23, 1948, the respondent was found guilty on two counts of a three-count information[2] which charged him with having knowingly deposited with the Railway Express Agency, for carriage in interstate commerce, certain obscene phonograph records, in violation of Section 245 of the Criminal Code, *supra,* (R. 2-5, 8-9).

[1] The italicized language was not changed in Section 1462 of the 1948 revision of Title 18, nor was there any substantial amendment of the section as a whole.

[2] The respondent waived prosecution by indictment (R. 4-5).

He was fined $100 on each count (R. 8-9). The respondent appealed, on the sole ground that the statute was inapplicable to phonograph records (R. 10-13); he admits that the phonograph records were obscene and that they were deposited for carriage in interstate commerce (R. 15). The Court of Appeals for the Ninth Circuit reversed the conviction upon the ground that obscene phonograph records are not within the prohibition of Section 245 of the Criminal Code (R. 15-18).

SUMMARY OF ARGUMENT

Obscene phonograph records are clearly within the normal meaning of the words "matter of indecent character" as employed in the statute, and equally clearly they are an evil of the sort which the statute was intended to suppress. The court below conceded as much. In such circumstances, where there is a plain legislative purpose, plainly expressed, there is no room for the application of the rules of *ejusdem generis* or narrow construction of penal statutes. Those rules, like every other rule of statutory construction, are no more than devices to aid in the paramount objective of statutory construction, which is to effectuate the purpose of the legislature. The lower court's mechanical application of technical rules of construction in such manner as to defeat a legislative intent, the existence of which the court recognized, was a perversion of the purposes of those rules.

ARGUMENT

I

OBSCENE PHONOGRAPH RECORDS ARE WITHIN THE PLAIN MEANING OF THE WORDS OF THE STATUTE, AND ARE PATENTLY AMONG THE EVILS WHICH THE STATUTE WAS INTENDED TO REACH. NO RULE OF STATUTORY CONSTRUCTION JUSTIFIES A DISREGARD OF THE OBVIOUS PURPOSE OF THE LEGISLATURE.

The statute, insofar as here pertinent, prohibits the shipment of any obscene "book, pamphlet, picture, motion-picture film, paper, letter, writing, print, *or other matter of indecent character.*" [Italics supplied.] This language certainly describes obscene phonograph records, and the court below conceded that they were an evil of the sort which the statute was intended to suppress. (R. 16.)

In order to upset the respondent's conviction, the court below had to find, and did find, that Congress did not include obscene phonograph records within the category of "other matter of indecent character." The reasoning by which it arrived at this conclusion is more ingenious than persuasive.

The word "photograph", said the court, is derived from the Greek words *photos,* light, and *graphos,* a writing. Hence, when Congress, in 1920, added photographic "motion-picture film" to a statute that already contained the English word "writing",[3] it demonstrated that the word "writing" was not used in its broadest sense. "Phonograph" is derived from the Greek *phone,* sound

[3] Act of June 5, 1920, c. 268, 41 Stat. 1060.

and *graphos*. If the word "writing", the court went on, did not "include *light* writing it certainly did not include *sound* writing." (R. 17.) The court concluded that Congress, when it enacted and amended the statute, "was thinking solely in terms of visual representation." Consequently, applying the rule of *ejusdem generis*, the court held that the "other matter of indecent character" which the statute was intended to prohibit was only that matter which transmitted obscene ideas to the brain through the sense of sight.[4] (R. 16-17.)

This reasoning attributes to Congress an almost pedantic erudition in Greek etymology, accompanied by extreme ineptitude in the practical business of preventing the shipment of obscene matter in interstate commerce. The court below admitted that "The use of phonograph records to transmit obscene matter involves the same mischief which the statute is designed to suppress. It is matter of indecent character * * *." (R. 16.) But it concluded that Congress, for some reason best known to itself, had made criminal the shipment of an obscene pamphlet, paper, or letter, and possibly even an obscene book in Braille (R. 17), but had not banned an obscene phonograph record. Such an interpretation flies in the face of common sense—a quality for

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[4] It could be argued that the word "print", as employed in the statute, is broad enough to include phonograph records, which are manufactured by impressing on a plastic disc a particular pattern. However, the Government prefers to rely upon less hairsplitting arguments.

which Congressmen are more renowned than for scholarship in Greek.

The paramount consideration in statutory construction, to which the rule of *ejusdem generis*, and every other rule of construction, are subordinate, is the effectuation of the intent of the legislature. See, *e.g.*, *Gooch* v. *United States*, 297 U. S. 124, 128; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 88-89; *United States* v. *Giles*, 300 U. S. 41, 48; *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Gilliland*, 312 U. S. 86, 93; *United States* v. *Gaskin*, 320 U. S. 527, 529-530; *United States* v. *Brown*, 333 U. S. 18, 26; Sutherland, *Statutory Construction* (3d ed. 1943) Secs. 4910, 4914. As this Court recently put it, in circumstances somewhat like those here presented, "our duty as a Court is to construe the word * * * as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind." *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 388.[5]

In the instant case the court below must have recognized that Congress, if it had acted at the time of the legislation with the present situation in

[5] The Court in the *Vermilya-Brown* case held that the phrase "possession of the United States", as employed in the Fair Labor Standards Act, included an island base leased from Great Britain, although neither the Act nor its legislative history contained any reference to leased areas, and the lease had been made after the passage of the Act.

mind, would have construed the "other matter of indecent character" to include obscene phonograph records, for its opinion concedes (R. 16) that "the use of phonograph records to transmit obscene matter involves the same mischief which the statute is designed to suppress."

In *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, the Court construed the phrase "interest on bonds, notes, or other interest-bearing obligations", as used in the Revenue Act of 1926, to include interest received from the United States with a refund of income taxes. The Court said (293 U. S. at pp. 88-89):

> But it is said that the phrase in question must be restricted in accordance with the rule of *ejusdem generis*. The point is not without merit. The phrase reads "interest on bonds, notes, or other interest-bearing obligations." If the rule invoked be held controlling, it would follow that the general words "other interest-bearing obligations" must be assimilated to the particular words "notes and bonds," and restricted to obligations of the same kind. But while the rule is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of *ejusdem generis* is only one. If, upon a con-

> sideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail.

The general object of the Revenue Act, the Court said, was "to put money into the federal treasury"; and surely this general object was no plainer than the present statute's general object, which is to keep pornography and the like out of interstate commerce. The tax law there concerned was, the Court said, to be construed strictly in favor of the taxpayer, as a criminal statute is to be construed strictly in favor of the accused; but "The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes * * *." 293 U. S. at p. 93.

The best possible evidence of the intent of the legislature is the language which it employs. Rules of statutory construction and even examination of the legislative history are useful only in so far as they may dissipate ambiguity. This Court said in *Browder* v. *United States*, 312 U. S. 335, 338, in answer to an otherwise plausible contention that the Congressional prohibition of "use" of a fraudulently obtained passport was not intended to apply to use by a citizen to effect re-entry into the United States, "The plain meaning of the words of the Act covers this use. No single argument has

more weight in statutory interpretation than this." In the instant case, it is obvious that obscene phonograph records are included within the normal meaning of the words "other matter of indecent character"; and, indeed, the Court below so conceded. (R. 16.) Moreover, the limitation of the phrase to objects employing visual means of communication renders it almost meaningless, for the statute's enumeration of specific items of this sort is sufficiently comprehensive so that little else would be left upon which the general words might operate. *Mason* v. *United States*, 260 U. S. 545, 554.

In brief, the genus which the phrase "other matter of indecent character" is intended to comprehend is not the genus "matter capable of communicating an obscene idea visually", but the genus "matter capable of communicating an obscene idea"; and the rule of *ejusdem generis* is applicable only to determine whether particular objects fall into the latter category. If this reasoning be accepted, it must also dispose of the contention that the genus of objects intended to be prohibited by Section 245 is limited not only to those objects which can communicate an obscene idea visually but to those which can do so without the aid of any mechanical device, such as a projector or magnifying glass.

Technical rules of construction and Greek etymologies are frail supports upon which to base an inference of legislative intent contrary to the plain meaning of the words employed; and the 1920

amendment of the Act to include "motion-picture film", furnishes no stronger justification for the lower court's reading of the Congressional mind. The court below assumed that Congress, on this occasion, "very properly considered that motion-picture film was not within the classification theretofore mentioned in the statute." (R. 16.) The legislative history shows merely that it was sought to amend the statute by "adding the words 'motion-picture films' to the list" of prohibited articles. H. Rep. No. 580, 66th Cong., 2d Sess.; S. Rep. No. 528, 66th Cong., 2d Sess.; 59 Cong. Rec. 2178-9, 7162, 7297, 8280, 8334. There was no intimation that this change was compelled by a belief that the statute did not already cover the item, and there was no judicial interpretation which might have inspired such a belief. The language of the statute would probably, in fact, have been construed to include motion picture film, without reference to the catch-all provision, for a motion picture film is no more than a strip of "pictures", each of which may be viewed by the simple process of holding it up to a light.[6] At that time there was considerable public alarm about the menace of

[6] *Eureka Productions* v. *Mulligan*, 108 F. 2d 760 (C.A. 2), reveals that obscene motion picture film was treated as subject to seizure under the Tariff Act of 1930, 19 U.S.C. (1946 ed.) 1305, which prohibited the importation of "any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral," but which did not expressly mention either photographs or motion picture film.

immoral films. See *The Motion Picture Industry* (Nov. 1947), 254 Annals of The Amer. Acad. of Pol. and Soc. Sci., at pp. 7-9, 140, 155, 157. While any inference as to the beliefs of Congress when it enacted this amendment is necessarily guesswork, it is much more probable that Congress simply acted out of an abundance of caution.

The force of the foregoing argument is in no wise weakened by the fact that Congress probably did not have phonograph records specifically in mind when it first enacted the statute in 1897.[7] "Old crimes * * * may be committed under new conditions. Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U. S. 335, 339-340. See, also, *Newman* v. *Arthur*, 109 U. S. 132, 138; *Pickhardt* v. *Merritt*, 132 U. S. 252, 257; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257; *Barr* v. *United States*, 324 U. S. 83, 90; Sutherland, *op. cit. supra*, Sec. 5102. As is shown in Point II, *infra*, Congress has long had a general purpose to

[7] Act of February 8, 1897, c. 172, 29 Stat. 512. The phonograph industry was then in its infancy; very likely none of its pioneers had at that date considered its pornographic potentialities. While the phonograph was invented in 1877, the year for which figures are available, was little more than value of all the products of the industry in 1899, the earliest $2,000,000. Thirteenth Census of the United States, 1910, Vol. X, pp. 524-525.

suppress, within the limits of its Constitutional power, the dissemination of every sort of obscene matter. It could not have hoped, when it enacted the statute, to anticipate and enumerate every invention or technical device by which obscenity might be communicated to the human race; and it could hardly have intended to amend the statute whenever a new method of communicating ideas was invented. It took the only feasible alternative when it included among the articles prohibited a category broad and general enough to forestall the activities of such ingenious persons as the respondent.

II

THE HISTORICAL BACKGROUND OF THE LEGISLATION DEMONSTRATES THE LONG-CONTINUED PURPOSE OF CONGRESS TO PROHIBIT, WITHIN THE LIMITS OF ITS CONSTITUTIONAL POWERS, THE DISSEMINATION OF EVERY SORT OF OBSCENE MATTER.

While the formal legislative history of the particular provision here concerned throws no light on the Congressional purpose, the statute must be viewed against its historical background, as one of a series of laws designed to suppress every form of traffic in obscenity. The efforts of Congress to suppress the traffic in pornography and the like go back at least as far as Lincoln's administration. The Act of March 3, 1865, c. 89, Sec. 16, 13 Stat. 504, 507, made it a misdemeanor to mail any "obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent

character"—a list which then included virtually every type of mailable matter which could reasonably be deemed capable of communicating obscenity.[8]

The real progenitor of the statute here concerned, as well as the present legislation prohibiting the mailing of obscene matter, was, however, the Comstock Act of March 3, 1873, c. 258, 17 Stat. 598. His most severe detractors have never denied to Anthony Comstock the quality of thoroughness in his pursuit of immorality, and the Act which he fathered, and which bears his name, was plainly intended to reach every device by which obscene

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[8] The Act of March 3, 1863, c. 71, Sec. 20, 12 Stat. 701, 705, at that time prescribed what was mailable in the following terms:

> Sec. 20. That the first class embraces all correspondence, wholly or partly in writing, except that mentioned in the third class. The second class embraces all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark, or sign. The third class embraces all other matter which is or may hereafter be by law declared mailable; embracing all pamphlets, occasional publications, books, book manuscripts, and proof sheets, whether corrected or not, maps, prints, engravings, blanks, flexible patterns, samples and sample cards, phonographic paper, letter envelopes, postal envelopes, or wrappers, cards, paper, plain or ornamental, photographic representations of different types, seeds, cuttings, bulbs, roots, and scions.

Since the first phonograph was still 14 years in the future, the term "phonographic paper" must have referred either to paper for shorthand writing (see Murray, *New English (Oxford) Dictionary* (1909), Vol. 7, "phonographic-2") or to a type of paper upon which a graph of sound vibrations could be traced by the "phonautograph". See Webster's New International Dictionary (1948) ("phonograph-2-phonautograph"); Oxford Dictionary, *supra*, ("phonautograph").

ideas could be communicated to the human mind. It provided in relevant part:

> That whoever, within the District of Columbia or any of the Territories of the United States, or other place within the exclusive jurisdiction of the United States, shall sell, or lend, or give away, or in any manner exhibit, or shall offer to sell, or to lend, or to give away, or in any manner to exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession, for any such purpose or purposes, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature * * *, shall be deemed guilty of a misdemeanor * * *.
>
> Sec. 2. That section one hundred and forty-eight of the act to revise, consolidate, and amend the statutes relating to the Post-Office Department, approved June eighth, eighteen hundred and seventy-two, be amended to read as follows:
>
> "Sec. 148. That no obscene, lewd or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character * * * shall be carried in the mail * * *."
>
> Sec. 3. That all persons are prohibited from importing into the United States, from any foreign country, any of the hereinbefore-mentioned articles or things * * *.

The first and third sections were clearly of the broadest possible scope. They included every kind of matter that could then be made into an obscene object, and there can be no doubt that they were intended to reach every manifestation of obscenity, without exception. That intent is part of the context of the act, in the light of which all its provisions must be read. *S.E.C.* v. *Joiner Corp.*, 320 U. S. 344, 350-351; Sutherland, *op. cit., supra*, sec. 4914. If section 2, relating to the mails, had been intended to be narrower, such an intent could be explained only by the wholly untenable assumption that Congress was less concerned with the mailing of some forms of obscenity than with their importation or sale. We submit, however, that the appearance of limited reach in that section is deceptive and is due to the use of language which, while narrower than that used in the preceding section, was nevertheless adequate to achieve the all inclusive purpose of the legislation at its inception in so far as mailable matter was concerned. So viewed, the various sections of the Comstock Act are seen to have been entirely consistent with each other and to have evidenced an undeviating purpose to forbid mailing as well as importation of or traffic in every kind of obscenity.

The present statute stems from the Act of February 8, 1897, c. 172, 29 Stat. 512. That Act prohibited the interstate carriage of the same articles (except motion picture film) as are now prohibited. The specific items listed were taken verbatim from

the then effective Act of September 26, 1888, c. 1039, Sec. 2, 25 Stat. 496, prohibiting the mailing of obscenity, which in turn was practically identical with the mailing provisions of the Comstock Act, *supra*. But there was one significant variation: whereas the general provision of the mailing statute spoke only of any "other *publication* of an indecent character", that of the present act bans any "other *matter* of an indecent character." The reason is plain: Congress considered that many articles which the mails could not handle might be shipped in interstate commerce and therefore chose the broadest possible general term for the statute affecting the latter.

We submit, therefore, that the history of this legislation, like its plain wording, demonstrates an unequivocal Congressional purpose to exclude from carriage in interstate commerce every kind of obscene matter. This purpose the court below should have given effect. Instead, having recognized the purpose, the court proceeded to nullify it by a wholly unwarranted resort to the rules of *ejusdem generis* and strict construction.

But the sole purpose of these, as of all rules of construction, is to achieve the legislative intent, never to frustrate it. The mechanical application of these rules in such manner as to defeat a plain legislative intent is a perversion of that purpose.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

217

No. 217

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ALEXANDER LAWRENCE ALPERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 217

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ALEXANDER LAWRENCE ALPERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

General Statement

Respondent concurs in the general statements of the Solicitor General in regard to the opinion below, jurisdiction, question presented and statute involved.

Summary of Argument

The burden rests upon the government to establish that the acts of respondent constitute a crime against the United States. It is not enough that the government show that the

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accused was guilty of reprehensible conduct. It is not enough that the government demonstrate that such acts *ought* to be a crime. The government must prove that the acts complained of *actually are* a crime.

The position of the government appears to be that, by using the general words "other matter of indecent character" after the specific enumeration, Congress evinced an intention that the act should be construed as being all-inclusive in nature. Based upon this assumption of Congressional intent, the government maintains that the court below erred in applying the rule of *ejusdem generis* and the principle of strict construction to the statute involved. Apparently the government has abandoned any claim that the general words "other matter of indecent character" can be construed to include phonograph records in the event the statute is not all-inclusive in operation and effect.

This position is directly opposed to that maintained by the government in the court below, wherein it conceded that the statute should be strictly construed and the rule of *ejusdem generis* applied. (*Alpers* v. *United States*, 175 F. 2d 137, R. 15). It is based upon the erroneous supposition that words have meanings in and of themselves and upon the mistaken belief that there exists some rule of law which prohibits resort to aids to statutory construction when words appear to be clear on superficial examination. All of the aids to statutory construction, which the government seeks to ignore, clearly establish that the general words "other matter of indecent character" as used in Title 18, U. S. C. (1946 ed.) 396, should be restricted in operation and their meaning determined by the application of the *ejusdem generis* doctrine. The decision of the court below is a correct application of these principles and should be affirmed.

ARGUMENT

I

The Court Should Make Use of All Available Aids to Statutory Construction in Determining the Meaning and Intendment of the Statute.

The contention of the government that the general words of the statute are comprehensive enough to include phonograph records, and therefore the court need not seek other aids to determine the meaning and scope of the statute in question *assumes the very fact in issue.* It is based upon the premise that words have meaning in and of themselves regardless of the context of the statute in which they are used. It overlooks the fact that a mere finding that the meaning of the words is clear is, in itself, a form of statutory construction. Words are at best inexact tools and for that reason there is no rule of law which forbids resort to relevant aids to statutory construction no matter how clear the meaning of the words may appear on superficial examination. *Harrison* v. *Northern Trust Company,* 317 U. S. 476, 479; *United States* v. *American Trucking Ass'n,* 310 U. S. 534; *Boston Sand and G. Co.* v. *United States,* 278 U. S. 41, 48.

Statutory construction is a fact issue. All relevant evidence on this question of fact should therefore be considered by the court. Sutherland: Statutory Construction (3rd Ed. 1943) Vol. II, Sec. 4502. As this court stated in *United States* v. *Dickerson,* 310 U. S. 554, 561-2, "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words . . . The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." This is particularly true in the instant case, where Congress

can be presumed to have known that similar phrases employed in criminal statutes have often been restrictively construed by the courts.

The case of *Browder* v. *United States*, 312 U. S. 335, cited by the government is not properly applicable to the action at bar. The construction of the specific word "use" in accordance with its ordinary acceptation is not in any way similar to the construction of a phrase to which frequent limitations have attached under accepted rules of statutory construction.

II

All Pertinent Principles of and Applicable Aids to Statutory Construction Demonstrate That the Words "Other Matter of Indecent Character" as Employed in Criminal Code Sec. 245, 18 U. S. C. (1946 ed.) 396, Are Not All-Inclusive in Operation and Effect.

A. *Penal statutes are to be strictly construed and all reasonable doubt concerning their meaning should be resolved in favor of the accused.*

Penal statutes are to be strictly construed. The law zealously guards the rights of an individual no matter how much it may abhor his conduct. Under our system of law, whatever the conduct of an individual may be, however much this conduct may offend our sensibilities, the courts will not punish that conduct unless it has been specifically delineated as a crime within the meaning and intendment of the statutes.[1]

While it is true that strict construction does not require words to be so narrowly construed as to exclude cases that

[1] *United States* v. *Reese*, 92 U. S. 214; *Jerome* v. *United States*, 318 U. S. 101, 105, 643; *Fasulo* v. *United States*, 272 U. S. 620; *United States* v. *Sheldon*, 15 U. S. 119; *United States* v. *Weitzel*, 246 U. S. 533; *United States* v. *Fruit Growers Express Co.*, 279 U. S. 363; *Prussian* v. *United States*, 282 U. S. 675; *United States* v. *Resnick*, 299 U. S. 207.

are fairly within their meaning, courts may not extend the application of a statute by judicial construction because they believe that the legislature should have made the law more comprehensive. Nor may courts extend the application of a statute because it appears to them probable that the failure of the statute to define the particular act was due to defective draftsmanship, inadvertence or mistake. This is true even though the act complained of may involve the same mischief the statute was designed to suppress.[2]

The rule of strict construction is founded upon the principle that in dealing with criminal statutes, the penalties of which circumscribe personal freedom, all reasonable doubt as to the statutory proscription of the act should be resolved in favor of the accused. Just as an accused must be acquitted of a charge, unless there is proof beyond a reasonable doubt of his guilt upon the facts so should an accused be dismissed if any doubt exists as to whether or not the acts he has committed constitute a crime.[3] The unanimous decision of the Circuit Court of Appeals for the Ninth Circuit which determined that phonograph records where not within the purview of the statute, should be proof enough on its face, that more than a reasonable doubt exists as to whether or not the statute was designed to cover such records.

While this court may not approve of the conduct of respondent, and while it may regret that Congress has not enacted proper legislation to proscribe such conduct, it should not extend the application of the statute by judicial

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[2] *United States* v. *Wiltberger*, 18 U. S. 76; *United States* v. *Chase*, 135 U. S. 255; *Fasulo* v. *United States*, 272 U. S. 620; *United States* v. *Weitzel*, 246 U. S. 533; *Vierek* v. *United States*, 318 U. S. 101, 105.

[3] *Harrison* v. *Vore*, 50 U. S. 372, 378; *United States* v. *Gaskin*, 320 U. S. 527, 530; (Dissenting opinion of Justice Murphy); *Ex Parte Webb*, 225 U. S. 663; Sutherland: *Statutory Construction* (3rd. ed. 1943), Vol. III, Sec. 5605.

legislation because it feels the protection of the public is better served thereby. To do so is to sow seeds of oppression which may prove more harmful to society in the long run than have the acts of respondent in this specific instance.

B. *The historical background of the legislation demonstrates that the statute involved is limited in operation and effect and that the general words are not to be construed as being all-inclusive.*

The legislative history of the particular provision here concerned and of the statutes in *pari materia* therewith, demonstrate that Congress has not considered this section to be unrestricted in operation and effect. This history, which is one of amendment and of restrictive interpretation by the courts, clearly shows that Congress at all times must have been aware of the limited character of the legislation.

Probably the first legislation on the subject of obscene representations was enacted on August 30, 1842, 5 Stat. 566. This statute, which was concerned with importation from foreign countries alone, was confined solely to *pictorial* obscenity. The pertinent language of this section prohibited the importation of "indecent and obscene prints, paintings, lithographs, engravings and transparencies." This original statute was amended on March 2, 1857, 11 Stat. 168 and finally found its way into the mail statutes on March 3, 1865, 13 Stat. 507, where for the first time the word "book" made its appearance in the legislation. The mail statute was once amended in 1872, 17 Stat. 335 and became a part of the Comstock Act of 1873, 17 Stat. 599.

The Comstock Act, set forth in its pertinent provisions in the brief submitted by the government, showed a wide divergence of language between the first section regulat-

ing the sale, lending, giving away or publishing of obscene books and pictures and the section governing the mailing thereof. The position of the government that the "appearance of limited reach in that section is deceptive and is due to the use of language which, while narrower than that used in the preceding section, was nevertheless adequate to achieve the all inclusive purpose of the legislation" is untenable in the light of the court decisions and Congressional action which took place after the enactment of the Comstock Act and prior to the present legislation.

On July 12, 1876, Section 2 of the Comstock Act covering the mailing of obscene matter was amended by adding to the specific enumeration the word "writing". 19 Stat. 90. Again, on June 18, 1888 Congress saw fit to amend this section to cover obscene language on the envelope, outside cover or wrapper of mail matter. 25 Stat. 187. On September 26, 1888, the section was again amended to add the word "letter" thereto. 25 Stat. 496.

In 1890 the Supreme Court in the case of *United States* v. *Chase*, 135 U. S. 255, held that prior to the amendment of September 26, 1888, the mailing of an obscene letter was not covered by the statute. Other decisions of that period also indicated that the mail statute was not all-inclusive.[4]

It was on February 8, 1897 that the present act concerning shipment in interstate commerce was first enacted, 29 Stat. 512. The specific enumeration was taken from the Act of September 26, 1888, 25 Stat. 496. The only variation was the substitution of the word "matter" in lieu of the word "publication" then used in the mail statute. The government contends that the purpose of the substitution was that "many articles which the mails could not handle might be shipped in interstate commerce" and there-

[4] *United States* v. *Huggett*, 40 F. 636; *United States* v. *Mathias*, 36 F. 892; *United States* v. *Commerford*, 25 F. 902; *United States* v. *Loftis*, 12 F. 671.

fore Congress chose a broader term for the statute affecting the latter. The logic of this statement does not appear clear in view of the contention of the government that the mail statute, as it existed at the time of the Comstock Act, was all-inclusive in nature. This statement by the government further is mere conjecture. A more likely and more reasonable explanation is that the word "matter" was substituted because of the court decisions referred to above, which held, in effect, that for an article to come within the purview of the section it had to be not only of the same class as the specifically enumerated articles, but that it also had to be a publication.

On March 4, 1909 the section became a part of the Criminal Code, Section 245, 18 U. S. C. (1946 ed.) 396, and again the language was changed by the addition of the word "filthy" thereto. From all of this history it does not appear that Congress could possibly have considered the statute as all-inclusive at any particular stage of its development. The actions taken by that body and the decisions of the courts in connection with the similar companion acts belie any such assumption.

C. *By its amendment of the statute in 1920 Congress again demonstrated that the act was not all-inclusive in nature and that the general words employed therein were limited in operation and effect.*

On June 5, 1920 Congress again amended Section 245 of the Criminal Code, 18 U. S. C. (1946 ed.) 396, by adding the words "motion picture film" to the list of articles specifically prohibited by statute. In this connection the government states that any inference as to Congressional intent must necessarily be guesswork but that it is probable that the amendment was enacted out of an abundance of caution.

The reasoning of the government not only overlooks the past history of the statute, but it also ignores the rule of

statutory construction that penal statutes are not to be construed on the basis of mere probabilities. It is an established principle of statutory construction, that in the absence of a known explanation it must be presumed that when a statute is amended some change in the law was intended. *Creek County* v. *Seber*, 318 U. S. 705, 718. As the Court said in the case of *United States* v. *Chase*, 135 U. S. 255:

> "An amendment was passed on September 26, 1888. For the first time in the history of the postal service the word 'letter' was included in the list of articles nonmailable by reason of being Obscene. . . . If letters were embraced in the statute upon which the indictment is founded why did Congress consider it necessary to insert the specific word to designate them in 1888. It must be that that body did not put the construction on the prior statute claimed on behalf of the United States else we would have it doing a vain and useless act."

A presumption of law is the product of the experience of the courts. It is an empirical yardstick to be utilized in case of doubt and in preference to mere conjecture and surmise. What the government complains of as a mere assumption on the part of the court below that Congress "considered that motion picture film was not within the classification mentioned in the statute" was nothing more or less than the court's application of this reliable principle in place of pure guesswork.[5]

What change was made by Congress in 1920? It could only have been the adding of something to the statute that had not existed there before, the prohibition of something

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[5] The case of *Eureka Products* v. *Mulligan*, 108 F. 2d 760, cited by the Government is not in point. There is no indication that in any of the proceedings the question was raised as to whether or not the statute involved covered motion picture film. It appears that the only issue tried was whether or not the film concerned was obscene. In addition the statute involved had an apparent greater scope than the present statute with which we are concerned.

that had not been prohibited before. At the time the amendment was made the general words "other matter of indecent character" were an integral part of the statute. Were these words considered by Congress to be unrestricted in scope and application no amendment would have been made or required, because no amendment could have added anything to the statute.

Pertinent excerpts from the Congressional Record, which are set forth in the Appendix hereto, bear out the correctness of the determination of the trial court. This legislative history unmistakably shows that the statute was confined to "certain inhibited articles" and that the amendment was enacted for the purpose of "including obscene motion picture film." This amendment was designed to "add" something to the statute that had not been contained within its provisions theretofore. Not only does this legislative history establish that the statute was one of specific enumeration but it amounts to a declaration that the words "other matter of indecent character" were used only in a restricted and limited sense.

D. *The title given to the section involved, "Importing and Transporting Obscene Books," indicates that the statute is not all-inclusive and does not cover every type of obscene matter.*

While the title given to an act is not necessarily controlling, it may be looked to by the courts as an aid in interpreting and construing the statute and in determining the true intention of the legislature in its enactment. *Holy Trinity Church* v. *United States,* 13 U. S. 457; *United States* v. *Katz,* 271 U. S. 354; Sutherland: Statutory Construction (3rd ed. 1943) Sec. 4802.

The particular act in question is entitled "Importing and Transporting Obscene Books," a title which reveals that the act was specifically designed to restrict the transporta-

tion of obscene literature and that it was not intended to be all-inclusive in scope. This fact is underlined by an examination of the title of the companion mail statute which prohibits the transportation of obscene matter through the mails. These sections, as the legislative history has demonstrated, had the same roots and grew out of the same statutes. The mail statute, 18 U. S. C. 334 (1946 ed.) bears the title "Mailing Obscene Matter" a much more general title in keeping with the more comprehensive language used in that statute.

The Criminal Code of the United States has been recodified and revised. This monumental and exhaustive revision began in late 1943 and was completed in the summer of 1948. The legislative history of this recodification and revision reveals that every part of each statute was given consideration, sections were consolidated, verbose phrases were pruned, archaic expressions eliminated, statutes dealing with the same general subject matter were arranged in the same chapters, and titles of sections were changed or modified. The legislative history further shows that each section was reviewed and examined and re-reviewed and re-examined to the end that each would clearly and simply express its true nature and scope.

In the revised and recodified Title 18, former Sections 334 and 396 were placed one after the other in Chapter 71 and numbered 1461 and 1462 respectively. The language and scope of former section 334 had been broadened to include matter of "a character tending to incite arson, murder, or assassination" by amendment on March 4, 1911, 36 Stat. 1339. This change in language and expansion of purpose is reflected in the new title given to the act, "Mailing obscene and crime-inciting matter."

The entire language of former section 396 was revised. It should be noted that no expansion of purpose or increase of scope was made in the substantive portion of the legis-

lation, the revision being concerned with simplification of language alone. It is readily apparent that this latter section dealing with transportation in interstate commerce cannot be construed to cover all matters proscribed by the statute dealing with the mails. It certainly is undisputed that it cannot be held to cover matter of "a character tending to incite arson, murder, or assassination." The limited reach of this section was recognized by the title given to it, "Importation or transportation of obscene literature." It should be noted specifically that while revising the language and the title of this section, Congress did not choose to employ a title which would compare in generality with that of the mail statute. Had Congress intended this statute to have general application to all obscene matter it would have been a simple matter for it to have made the title read "Importation or transportation of obscene *matter.*" It did not do so. In view of the care, thought and study that went into this revision it logically appears that Congress did not intend this section to be all-inclusive in scope, but was only concerned with obscene literature, a word which, itself, defines the limits of the statute.

E. *By its enumeration of particular articles of obscene matter belonging to a single class, Congress evinced an intention of limiting the application of the statute and of the general words employed therein.*

Where a statute employs specific words enumerating specific classes, modes or species, the statute should be construed as being limited in operation and not all-inclusive in scope. This principle of limitation attaches to the general words as well as to the specific enumeration. It is based upon the sound reason that if the legislature had intended the statute to be unrestricted in scope and the general words to be universal in application, it would have

de no mention of special classes or things at all, but uld only have employed general words such as "all per- ns who" or "any obscene or indecent matter." It is upon s sound and logical basis that the rule of *ejusdem gen- is* was founded. In re *Bush Terminal* (CCA-2) 95 F. 2d 9.

III

e Rule of Ejusdem Generis Is Particularly Applicable to the Statute Involved and under This Rule the General Words "Other Matter of Indecent Character" Cannot Be Construed to Extend to Phonograph Records.

A. *The rule generally stated.*

The rule of *ejusdem generis* provides that where general rds follow the enumeration of particular classes or spe- ic things belonging to a particular class, the general rds are to be limited in their application to things of the me species or genus as those specifically enumerated. In actical application it simply means that where there is a ecific enumeration of persons or things of the same class species followed by a clause embracing "other" or ny" persons or things, the general words "other" or ny" are read as "other such like" or "any such like" d not as though they were unrestrictive in operation and fect.

B. *The rule ejusdem generis is particularly applicable the statute involved.*

The rule of *ejusdem generis* is particularly applicable penal statutes. *United States* v. *Salem*, 235 U. S. 237; *rst National Bank of Anamoose* v. *United States*, C. C. -8), 206 Fed. 374. While the government now main- ins that it was error for the court below to apply this le to the statute, it admitted that the rule was ap- icable when the matter was presented in that court.

United States v. *Alpers*, 175 Fed. 2d 137 (R. 15). In support of its present position as to the inapplicability of the statute the government cites the case of *Helvering* v. *Stockholm Enskilda Bank*, 293 U. S. 84. This case, which dealt with a tax statute and not with a criminal action, admitted that the "rule is a well established and useful one." The reason the court did not apply the rule in the *Stockholm Bank* case was because the legislative intent, as gained from a study of all other aids, indicated that the general language was not employed in a limited sense.

It is true that the rule of *ejusdem generis* may not always be applicable to statutes defining crimes. However, a review of the special circumstances under which the courts have held the rule inapplicable discloses that none of these circumstances exist in the present action. Firstly, the courts have held that the rule should not be applied where the clear intention of the legislature, as gained from all other available aids, is to make the statute all-inclusive. It is readily apparent that no such clear intention exists in this case. Secondly, the courts have denied the applicability of the rule in those cases where the articles in the specific enumeration had no common attribute to set them apart as belonging to any particular class or species. It is quite obvious that this exception does not apply in the instant case, where all the articles represent one prime class—visual representations. The courts, also, have restricted the application of the rule where the specific enumeration is sufficiently complete to exhaust the class to which the articles belong, thus leaving nothing for the general words to operate upon. In the present case the specific enumeration barely scratches the surface. Other visual representations which may be considered as covered by the general language of the statute under the doctrine of *ejusdem generis* are: Newspapers, magazines, periodicals, brochures, wood cuts, engravings, etchings, lithographs,

cartoons, posters, advertisements, circulars, limericks, poems, etcetera.

C. *In applying the rule of ejusdem generis the general words of the statute must be limited to matters of the same class or species as that to which the items in the specific enumeration belong.*

The position of the government that if the rule *ejusdem generis* is applicable, the genus to which the general words should apply is obscene matter is one that would render the rule nugatory. The general words would then become unrestricted in operation and the statute all-inclusive in scope. In applying the rule of *ejusdem generis* it is not enough that the matter involve the same mischief which the statute is designed to suppress, it must also be of the same class as the articles listed in the statute. Where the statute deals with specific things or particular modes then the general words must be limited to such things or modes. *U. S.* v. *Wiltberger*, 18 U. S. 76; *U. S.* v. *Chase*, 135 U. S. 255. The statute may not be extended to things of a different class or species even though it may appear to the court that the same policy applies thereto. As this Court stated in *McBoyle* v. *United States*, 283 U. S. 25, 27, "The statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely much broader words would have been used."

A survey of a few of the decided cases shows the correct application of this principle. This Court held in *Hansen* v. *Hoff*, 291 U. S. 559, that the phrase "any other immoral purpose" after the enumeration "Prostitution" did not include an immoral purpose short of concubinage. Unfermented loganberry juice was held in *United States* v. *Phez. Co.*, 28 F. 2d 106 not to be within the meaning of the phrase "and other soft drinks" after the enumeration "unfer-

mented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters or beverages." In *Lyman* v. *C. I. R.*, 83 F. 2d 811, crop shortage was held not within the meaning of the words "or other casualty" after the enumeration "fire, storms, shipwreck." In *Parkman* v. *Lemmen*, 119 Kan. 323 a shotgun was not included in the words "other dangerous weapon", as all the enumerated weapons were hand weapons.

The listing could be continued indefinitely. The principle would remain the same. It is not enough that the purpose be immoral, the weapon be dangerous, the drink be a soft drink, the loss be due to a casualty, it must also be that the act or article complained of be of the same class of immorality, dangerous weapons, soft drinks, or casualties, as those enumerated in the statute.

In Re: Bush Terminal, 93 F. 2d 659;
State of Missouri v. *Wilson*, 166 S. W. 2d 499;
In Re: Barre Water Co., 62 Vt. 27;
Resnick v. *Boyd*, 99 Pa. 555;
People v. *McKean*, 76 Cal. App. 114;
Rhone v. *Loomis*, 74 Minn. 200, 77 N. W. 1025;
Ex Parte Neet, 157 Mo. 527, 57 S. W. 1025;
Ex Parte Roquemore, 60 Tex. Cr. 282, 131 S. W. 1101;
Chicester Chemical Co. v. *United States*, 49 F. 2d 516;
Erwin v. *City of New Jersey*, 37 Atl. 732.

D. *The general words "other matter of indecent character" cannot be construed to include phonograph records.*

The reasoning of the Court below which the government condemns is sound. The court first found that the statute was not all-inclusive. It next found that all of the articles listed in the statute belonged to a single broad classification—visual representations. The court determined, however, that all visual representations were not *ejusdem generis* with the enumerated articles since all of the spe-

cifically named articles had one further characteristic in common which set them apart, they could all be read or observed without the aid of any mechanical contrivance. In view of this fact, they determined that the amendment of 1920 was proper and reasonable. What the government complains of as a resort to "pedantic erudition in Greek etymology" was not indulged in by the court to show that the statute covered only visual representations. This it had already established. The government had insisted that under the rule of *ejusdem generis* the general words of the statute covered phonograph records. It is true that most of its argument was concerned with the word "print". The purpose of the court, however, was to demonstrate not only that records could not be considered as belonging to a class defined by the word "print" but also to demonstrate that they could not belong to a class defined by the word "writing." This it did by showing that the word "writing" was used in a limited sense. It foresaw a possible contention that since the etymology of the word phonograph was tied in with the word writing an attempt might be made to include records under such a term. The purpose of its discussion was to dispel any such contention. Having determined that phonograph records were not within the meaning of the word writing, the court then went on to point out that Congress did not add phonograph records to the statute in 1920 because it was thinking solely in terms of visual representation.

IV

If the Shipment in Interstate Commerce of Obscene Phonograph Records Is to Be Prohibited, It Should Be Accomplished by Amendment of the Statute and Not By the Strained Construction of the Court.

The government has argued at some length that Congress should not be required to amend the statute whenever a

new method of communicating ideas is invented. In support of this position it has argued, further, that a statute necessarily embraces everything which may subsequently fall within its scope and therefore the Court should construe this particular statute as its judgment dictates Congress would have done if it had acted with the present situation in mind. This argument has two fatal flaws. Firstly, it assumes the very fact in issue—the all-inclusiveness of the statute. Secondly, it fails to recognize that Congress has acted with the present situation in mind and has failed to prescribe the shipment of obsence phonograph records in interstate commerce.

As a legal proposition, it is not disputed that a statute, general in application and universal in scope, may be construed to include new situations which fairly come within its orbit. This proposition is valid, however, only if the statute is all-inclusive. Whenever a statute is expressly made applicable to a particular situation, a specific thing, or to a particular class of a larger group, subsequent events will have no effect to enlarge the meaning of the statute. *McBoyle* v. *United States*, 283 U. S. 25, 27; Sutherland: Statutory Construction (3rd ed. 1943) Sec. 5102, Vol. III, p. 511. The statute with which we are dealing here is one that is limited in application to a particular class of a larger group. The argument made by the government is, therefore, not persuasive in the instant action. It should be noted that none of the cases cited by the government in support of this proposition were concerned with a statute which was limited in reach or to which the rule of *ejusdem generis* applied. With the exception of the case of *Browder* v. *United States*, 312 U. S. 335, none of these cases involved penal statutes. That case, as we have already seen, is not applicable to the case at bar.

Congress in dealing with this particular problem has been only concerned with literature and with other visual

representations. If obscene phonograph records constitute an unforseen problem then it is the type of problem referred to by Justice Frankfurter in his dissenting opinion in *Barr* v. *United States*, 324 U. S. 83, at page 100 wherein he stated: "In this case we have not an unforseen situation fitting into a general context. Here we have an unforseen problem with which Congress did not deal . . . If the problem itself was not in the contemplation of Congress, as this problem was not, how can it be said that Congress legislated against that problem?"

In construing this statute the Court may well assume that Congress had the present situation in mind.[6] In the first place, it must be remembered that prior to the enactment of the original legislation, the companion statutes had been subject to frequent amendment and restrictive interpretation. In between the time of the original enactment and the amendment of 1920, the phonograph increased greatly in popularity. At the time of the amendment of 1920 phonograph records were as capable of carrying obscene recordings as they are today. Yet, while Congress saw fit, at that time, to amend the statute by adding motion picture film, it did not seek to add phonograph records. When the tremendous work of revision and recodification took place during the years 1943-1948, there can be no doubt that phonograph records were already old means of communicating ideas. Certainly, the interstate traffic in these records was in existence during this period. Nevertheless, Congress in enacting the revised section, 18 U. S. C. 1462 did not add phonograph records to the list of prohibited articles nor did it give any indication that it considered them covered by this

[6] The case of *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, is therefore not in point, but it is interesting to note that this case, too, stands for the proposition that words have different shades of meaning, and that the meaning of the words as used in a particular statute is to be determined by considering all the circumstances under which the words were employed.

statute. As we have demonstrated, it amended the language of the statute, it changed the title, but it did not increase its scope. It was still confined to literature and to other visual representations. Since this matter was determined by the court below, no attempt has been made by Congress to modify or amend the statute to include such records. In view of all these facts, it appears apparent that phonograph records are not a new means of conveying an old idea, and that Congress has acted with such records in mind and has either neglected or refused to consider them sufficiently important to prevent their shipment in interstate commerce.

Why Congress has failed to proscribe phonograph records which carry dirty songs and stories is a matter of mere conjecture. Perhaps, it has determined that they are no better nor worse than dirty jokes, not the sort of thing one tells in the best of company, but, nevertheless, not evil enough to corrupt the morals of their listeners. Perhaps, it may be because it believed that auditory obscenity is transitory and fleeting and not susceptible of immoral purposes as are pictures or books, which may be carried about on the person or hidden and later brought forth to dwell upon at length and in secret.[7] It may be that Congress merely has neglected to consider such records. Whatever the reason, however, it is clear that Congress has not proscribed their shipment in interstate commerce at the present time.

The purpose of criminal statutes primarily is not to punish the wrongdoer. The prime purpose of a criminal statute is to prevent the performance of acts which the lawmakers deem harmful to society. Citizens and subjects are not consulted and have no direct voice in choosing the phraseology of a statute. Under such circumstances, it is far better to insist that the statute be made clear and the

[7] While it is true that Congress has banned obscene language over the radio, it may have considered this an entirely different evil, in view of the fact that a radio broadcast reaches a vast, unsuspecting audience.

luty of the citizen unmistakable, than it is to punish an ndividual and in so doing to extend the operation of statute beyond its clear scope without warning. For all practical purposes, the government has stopped the interstate traffic n this type of phonograph record. Having accomplished his administrative purpose, it should have amended he statute, and relieved the situation of doubt. Considered in his light it is difficult to ascertain the position of the gov- rnment. On the one hand it has insisted that the danger s great, and on the other it has taken no steps to assure the prevention of this evil in the event the opinion rendered by he court below over one half year ago is affirmed. If the hipment in interstate commerce of obscene phonograph records is harmful to society, the well being of and the duty o the citizen would have required and does require that such an amendment be made.

Conclusion

For the foregoing reasons it is respectfully submitted hat the judgment of the court below should be affirmed.

A. J. Zirpoli,
Attorney for Respondent.

Haskell Titchell,
Of Counsel.

APPENDIX

CONGRESSIONAL RECORD
66th CONGRESS
2nd SESSION

January 6-28, 1920

59

Pages 1081-2180

Page #2170—House of Representatives:

Mr. Walsh: "Mr. Speaker, the only amendment to the penal law which this bill makes is to insert the words "Motion-picture film" in section 245. Section 245 places a penalty upon persons who bring or cause to be brought into the United States, and so forth, or deposit or cause to be deposited with an express company for transportation *certain inhibited objects* . . . and this *includes within that classification* motion-picture film . . ."

CONGRESSIONAL RECORD
66th CONGRESS
2nd SESSION

May 4-24, 1920

59

Part 7

Pages 6485-7556

Page #7297: House of Representatives:

Mr. Walsh: "Mr. Speaker, this bill passed the House several weeks ago. It amends the penal code by simply *including obscene* motion-picture films among the *articles that are not permitted* to be transported in interstate commerce. . . ."

CONGRESSIONAL RECORD
66th CONGRESS
2nd SESSION

59

Page #8334: June 3, 1920—Senate:

Senator Nelson: ". . . to amend the law in reference to lascivious pictures, and so forth, *so as to include theatres and motion-picture shows* . . ."

The House Report on this amendment is as follows:—

HOUSE OF
REPRESENTATIVES

66th CONGRESS — REPORT
2nd SESSION — No. 580

Mr. Walsh, from the Committee on the Judiciary, submitted the following report:

"The Committee on the Judiciary, to whom was referred H. R. 7629, a bill to amend the penal laws of the United States, report the bill favorably with the recommendation that the bill do pass.

The only change in section 245 of the penal laws is by adding the words 'motion-picture film' *to the list of articles which are prohibited from carriage* by common carrier from . . ."

The Senate Report on this Amendment is as follows:

CALENDAR NO. 480
SENATE

66th CONGRESS — REPORT
2nd SESSION — No. 528

Mr. King, from the Committee on the Judiciary, submitted the following report:

". . . that the only change which they intended to make in the present law is to *add* the words 'motion-picture film' *to the list of articles that are prohibited from carriage* . . ."